

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE SCHERZINGER CORPORATION

and

ROBERT COLLEY, an Individual,

Case 09-CA-165460

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**RESPONDENT THE SCHERZINGER CORPORATION'S**  
**BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE**  
**ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION.**

The facts of this case are not in dispute.<sup>1</sup> The Scherzinger Corporation (“Respondent”) provides pest control services throughout the greater Cincinnati, Ohio/Northern Kentucky, Dayton, Ohio, and Columbus, Ohio areas. Respondent provides pest control services to both residential and commercial customers. Since August 2015, Respondent has issued to its employees the “Scherzinger Complaint Procedures” (“Agreement”)<sup>2</sup> and has required employees to sign and be bound by the Agreement as a condition of their continued employment. Respondent has maintained and enforced the Agreement since August 2015.

As part of the Agreement, both Respondent and its employees have agreed that any disputes that cannot otherwise be resolved at a prior step in the ADR process “shall be solely, finally, exclusively and conclusively adjudicated through Arbitration” before the American Arbitration Association (“AAA”) in Cincinnati, Ohio pursuant to AAA rules. As part of the Agreement, Respondent agreed to arbitrate potential claims against its employees and pay all costs of the arbitrator. Employees who signed the Agreement also waived their right to pursue claims against Respondent on a class-wide basis.

Notably, the Agreement expressly preserves the right of employees to file charges or otherwise participate in proceedings before the Board. It states, in relevant part:

Claims not covered by this Agreement are claims for workers’ compensation, unemployment compensation benefits or any other claims that, as a matter of law, the Parties cannot agree to arbitrate. **Nothing in this Agreement shall be interpreted to mean that Employee is precluded from filing complaints with the federal Equal Employment Opportunity Commission or the National Labor Relations Board.** (Emphasis added)

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<sup>1</sup> The facts in this case can be found in the Joint Motion and Stipulation of Facts submitted on May 11, 2016, and the exhibits attached thereto (hereinafter “Jt. Ex”).

<sup>2</sup> Jt. Ex. C.

On November 8, 2015, Robert Colley,<sup>3</sup> a former employee of Respondent, filed a class and collective action complaint in the United States District Court for the Southern District of Ohio alleging that Respondent violated the Fair Labor Standards Act (“FLSA”), as well as the wage and hour laws of the State of Ohio and the Commonwealth of Kentucky.<sup>4</sup> Steven Davenport, one of Respondent’s employees who signed the Agreement, filed an Opt-In Consent form to join the litigation against Respondent on December 4, 2015. On January 8, 2016, Respondent filed a motion to dismiss Davenport from the litigation based on the terms of the Agreement. **On May 26, 2016, Judge Sandra S. Beckwith of the United States District Court of the Southern District of Ohio granted Respondent’s motion and dismissed Davenport from the litigation.** In her decision, Judge Beckwith expressly addressed – and rejected – Davenport’s claim that the Agreement’s class and collective action waiver violated the Act. *Colley v. Scherzinger*, 2016 U.S. Dist. LEXIS 68574 (S.D. Ohio May 25, 2016).

In spite of the mountain of precedent upholding agreements similar to Respondent’s, Colley filed the present unfair labor practice charge alleging that Respondent maintained a class action waiver which restricted employees’ rights under Section 7 of the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. § 157, *et seq.* On June 17, 2016, Administrative Law Judge Paul Bogas (“ALJ”), relying on recent Board precedent, found that Respondent violated Section 8(a)(1) of the Act by maintaining and seeking to enforce the Agreement. The ALJ dismissed the remaining allegation in the General Counsel’s Complaint.

This is not a typical unfair labor practice case that can be decided in a vacuum of National Labor Relations Board (“Board” or “NLRB”) precedent. Rather, it is a proceeding that

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<sup>3</sup> Mr. Colley never signed the Agreement during his employment with Respondent, and Respondent has never attempted to enforce the Agreement with respect to him.

<sup>4</sup> The court dismissed all of Plaintiffs’ Kentucky claims on April 25, 2016. *Colley v. Scherzinger Corp.*, 2016 U.S. Dist. LEXIS 54750 (S.D. Ohio April 25, 2016).

brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through another statute, namely, the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* Four recent decisions of the United States Supreme Court have established the broad preemptive sweep of the FAA. These decisions by the High Court mandate that arbitration agreements be enforced according to their terms, and they reject the application of other state and federal statutes to arbitration agreements in the absence of an express “congressional command” to override the FAA.

The NLRA does not override the FAA. The Supreme Court, as well as the Second, Fifth, Eighth, Ninth and Eleventh Circuits have explicitly or implicitly rejected the Board’s position that class/collective action waivers violate the Act. Indeed, the Fifth Circuit denied enforcement of the Board’s decisions in *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (2012) and *Murphy Oil USA*, 361 NLRB No. 72 (2014). The rationale underpinning the Board’s decisions in *D.R. Horton* and *Murphy Oil* is flawed and inconsistent with the mandate of the FAA. Accordingly, in the proceeding below, Administrative Law Judge Paul Bogas (“ALJ”) erred by relying upon these wrongfully-decided cases to find that Respondent violated the Act.

The Board does not have jurisdiction to find Respondent’s Agreement, which includes a class/collective action waiver, violates the Act. As noted by Member Miscimarra in his *Murphy Oil* dissent, “nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how other courts or other agencies would adjudicate non-NLRA legal claims, whether as ‘class actions,’ ‘collective actions,’ the ‘joinder of individual claims’ or otherwise.” 361 NLRB No. 72 at 23.

Accordingly, for the reasons set forth herein, Respondent respectfully requests that the Board reverse the ALJ's decision and dismiss the General Counsel's Complaint in its entirety, with prejudice.

**II. THE ALJ ERRED IN REFUSING TO FOLLOW SUPREME COURT PRECEDENT INTERPRETING THE FAA AND MANDATING THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS.**

**A. The Validity of Respondent's Agreement and the Class/Collective Action Waiver Contained in the Agreement Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA [Exception Nos. 1-3, 5-11, 14-15, 17].**

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which was issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class/collective action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see also CompuCredit v. Greenwood*, 132 S. Ct. 665, 669 (2012) (also issued after the Board's decision in *D.R. Horton*). The Supreme Court has further held that a class/collective action waiver is not invalidated by the so-called effective vindication doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *American Express*, 133 S. Ct. at 2310.

Under *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit*, *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012), and *American Express*, the validity of Respondent's Agreement and class/collective action waiver contained therein must be determined under the FAA, not under *D.R. Horton*, *Murphy Oil* or the NLRA. Rather, in construing the broad reach and preemptive effective of the FAA the Supreme Court has held:

- **The FAA reflects an "emphatic policy in favor" of arbitration.** Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as

exist at law for the revocation of any contract.” 9 U.S.C. § 2. The FAA “reflects an emphatic federal policy in favor” of arbitration. *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011)(internal citations omitted). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 23, n. 27 (1983), and are to be “rigorously enforced,” *Perry v. Thomas*, 482 U.S. 483, 490 (1987)(internal citations omitted).

- **Arbitration agreements, including those containing class/collective action waivers, are enforceable in accordance with their terms.** “The FAA reflects the fundamental principle that arbitration is a matter of contract.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)(internal citations omitted). As such, courts are primarily charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See, e.g., CompuCredit*, 132 S. Ct. at 669 (The FAA “requires courts to enforce agreements to arbitrate according to their terms”); *Marmet*, 132 S. Ct. at 1203 (internal citations omitted) (The FAA “requires courts to enforce the bargain of the parties to arbitrate”). As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683 (2010) (The parties to an arbitration “may agree to limit the issues they choose to arbitrate,” “may agree on [the] rules under which any arbitration will proceed,” and “may specify *with whom* they choose to arbitrate their disputes”)(internal citations omitted). Indeed, as the Supreme Court recently observed when holding that a state law requiring parties to submit to class arbitration was preempted by the FAA: a state law requiring parties, in contravention of their arbitration agreement, to “shift from bilateral arbitration to class-action arbitration” results

in a “fundamental” change to their bargain and is “inconsistent with the FAA.” *AT&T Mobility*, 131 S. Ct. at 1748-1751 (internal citations omitted).

- **Arbitration agreements involving federal statutory rights, including those containing class/collective action waivers, are enforceable “unless Congress itself has evinced an intention,” when enacting the statute, to “override” the FAA mandate by a clear “contrary congressional command.”** *Mitsubishi v. Soler Chrysler*, 473 U.S. 614, 627 (1985) (internal citations omitted); *American Express*, 133 S. Ct. at 2309. The Supreme Court has consistently held that parties may agree to arbitrate claims arising under federal statutes. *See, e.g., Mitsubishi, supra*, 473 U.S. at 627. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S. Ct. at 671 (“So long as the *guarantee* [of a federal statute’s civil liability provision]—the *guarantee of the legal power to impose liability*—is preserved,” the parties remain free to enter into an agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,” then such statutory rights cannot be subjected to arbitration and the FAA’s mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 473 U.S. at 628; *American Express*, 133 S. Ct. at 2309. “If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent ‘will be deducible from [the statute’s] text or legislative history’” or “from an inherent conflict between arbitration and the statute’s underlying purpose.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), quoting *Mitsubishi*, 473 U.S. at 627, 632-637. However, any expression of congressional intent in this regard must be clear and

unequivocal. *See, e.g., CompuCredit*, 132 S. Ct. at 673 (If a statute “is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms”).

- **Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements.** The FAA encompasses employment arbitration agreements, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001), including those containing class/collective action waivers. As the Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991), where it enforced an arbitration agreement involving a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be “unequal bargaining power between employers and employees” and even if “the arbitration could not go forward as a class action.”<sup>5</sup> As to this latter point, the Supreme Court in *Gilmer* implicitly recognized that a class action, as set forth in the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot “abridge, enlarge or modify any substantive right”—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. Indeed, as discussed below, there is nothing in the NLRA itself or its legislative

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<sup>5</sup> The *Gilmer* court also recognized that “it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief.” *Id.* Similarly, in the present case, the Agreement would not preclude the United States Department of Labor, or similar state agency, from seeking class-wide or equitable relief on behalf of Charging Party. In fact, the Agreement explicitly permits employees to pursue relief through government agencies.

history that would even suggest that Congress sought to “override” the FAA’s mandate and preclude an employee from waiving his or her procedural right to file a class/collective action when agreeing to arbitrate employment-related claims. Accordingly, by failing to follow this controlling precedent, the ALJ erred in finding the Agreement in this case to be unlawful.<sup>6</sup>

**B. Following Supreme Court Precedent, Federal Courts – Including the Court Hearing the Underlying Wage and Hour Dispute Between Respondent and Colley – Have Routinely and Correctly Rejected Board Precedent on this Issue [Exception Nos. 1-3, 5-11, 14-15, 17].**

On December 3, 2013, the United States Circuit Court of Appeals for the Fifth Circuit granted the petition for review filed by D.R. Horton, Incorporated and ultimately set aside the Board’s decision invalidating the company’s arbitration agreement. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *pet. for rehearing en banc denied* (5th Cir. No. 12-60031, Apr. 16, 2014). The court held that “the Board’s decision did not give proper weight to the [FAA].” *Id.* at 348. In a detailed opinion, the court examined the Board’s *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board’s arguments.

First, the court ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a “procedural device.” *Id.* at 357. The court also held that the Board could not rely on the FAA’s “saving clause” to justify its invalidation of arbitration agreements. On this point, the court explained that “[r]equiring the availability of class actions ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’” *Id.* (internal citations omitted). The court also determined that the Board’s prohibition of class action waivers disfavors arbitration, as it ruled that “[w]hile the Board’s

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<sup>6</sup> Respondent respectfully urges the Board to overrule *D.R. Horton* and *Murphy Oil* and follow the decisions of ALJ Keltner Locke in *Haynes Building Services*, 31-CA-093290, 2014 NLRB LEXIS 94 (Feb. 7, 2014) and ALJ Bruce D. Rosenstein in *Chesapeake Energy Corporation*, No. 14-CA-100530, 2013 NLRB LEXIS 693 (Nov. 8, 2013). ALJs Locke and Rosenstein followed Supreme Court precedent by recommending the dismissal of the Section 8(a)(1) allegations in the General Counsel’s complaint in those cases, which were based on the Board’s decision in *D.R. Horton*.

interpretation is facially neutral – requiring only that employees have access to collective procedures in an arbitral or judicial forum – the effect of this interpretation is to disfavor arbitration.” *Id.* at 360. Therefore, the court ruled that “[a] detailed analysis of *AT&T Mobility* leads to the conclusion that the Board’s rule does not fit within the FAA’s saving clause.” *Id.* at 359.

Next, the court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer*, the court stated: “When considering whether a contrary congressional command is present, courts must remember ‘that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Id.* (internal citations omitted). The Fifth Circuit explicitly ruled that “there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.” *Id.* Moreover, the court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361.

The Fifth Circuit in *D.R. Horton* also noted that it was of some importance that “the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice.” *Id.* at 362 (internal citations omitted). Thus, the Court reached the conclusion that “[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA,” noting that “[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class action waivers enforceable.” *Id.*

The October 26, 2015 decision of the Fifth Circuit in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) did not rehash the substantive reasons for granting the respondent’s petition for review. Instead, the court held:

Our decision in [*D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013)] was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.

*Id.* at 1018.

Dozens of other federal and state courts have determined – and, in many instances, expressly rejected the Board’s reasoning in *D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil*, 361 NLRB No. 72 (2014) – that class/collective action waivers contained in agreements to arbitrate employment related disputes do not violate the Act. *See Murphy Oil, supra*, slip op. at 36 n.5 (Johnson, dissenting) (collecting citations to dozens of Federal and state courts rejecting *D.R. Horton I.*)<sup>7</sup> Notably, **one of the latest of these cases involves the same parties currently before the Board.**

On May 25, 2016, United States District Court Judge Sandra S. Beckwith rejected Davenport’s argument that the class action waiver contained in the Agreement violated the Act and enforced the Agreement’s arbitration provisions, dismissing Davenport from the litigation. *Colley v. Scherzinger*, 2016 U.S. Dist. LEXIS 68574 (S.D. Ohio May 25, 2016). In doing so, Judge Beckwith expressly found the Fifth Circuit’s analysis of the instant issue “persuasive” and adopted “its conclusion that the NLRA does not prohibit an arbitration agreement that includes a prohibition on collective arbitration of FLSA claims.” *Id.* at p. 14. It boggles the mind that

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<sup>7</sup> The ALJ’s citation to the United States Court of Appeals for the Seventh Circuit’s decision in *Lewis v. Epic Systems Corp.*, No. 15-2997 (7th Cir. May 26, 2016) does not alter this analysis. The Seventh Circuit has taken the clear *minority* view that class/collective action waivers violate the National Labor Relations Act. By contrast, the Second, Fifth, Eighth, Ninth, and Eleventh Circuits, which collectively represent the *majority* view on this issue, have all explicitly or implicitly *rejected* the Board’s position that such waivers are unenforceable because they violate the National Labor Relations Act. *See Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), *Murphy Oil USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (*en banc* review denied May 13, 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 2016 U.S. App. LEXIS 10002 (8th Cir. June 2, 2016); *Richards v. Ernst & Young, LLP*, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014).

Respondent could be found to have violated the Act by maintaining the Agreement's class action waiver when a federal court has already considered *and rejected* the exact same argument.

Judge Beckwith's decision also presents the Judge and Board with the same problem aptly identified in Member Miscimarra's *Murphy Oil* dissent:

The instant case vividly demonstrates the unworkable nature of the regulatory scheme contemplated by my colleagues in the majority. First, the majority finds Respondent violated the NLRA by filing a *meritorious* motion that *the district court granted* pursuant to the FAA, a statute that confers jurisdiction on the court, not the NLRB. Second, the majority likewise orders Respondent to pay the plaintiffs' attorneys fees regarding an issue as to which *the plaintiffs lost* and *the Respondent prevailed*. Third, existing case law demonstrates that *other* employers and employees litigate similar disputes regarding "class" waiver agreements in countless non-NLRA court actions throughout the country, and many courts are likely to enforce such waiver agreements. The Board cannot impose a "single, uniform, national rule" regarding these issues unless there is a parallel NLRB proceeding, pertaining to *every* case in which a "class" waiver is enforced, so the Board can adjudicate and impose in these other cases the same remedies being formulated here.

*Murphy Oil*, *supra*, slip op. at 23 (Miscimarra, dissenting) (emphasis in original). Member Johnson expressed similar reservations:

Instead, with this decision, the majority effectively ignores the opinions of nearly 40 Federal and State courts that, directly or indirectly, all recognize the flaws in the Board's use of a strained, tautological reading of the National Labor Relations Act in order to both override the Federal Arbitration Act and ignore the commands of other Federal statutes. Instead, the majority chooses to double down on the mistake that, by now, is blatantly apparent.

The majority's essential rationale for its choice boils down to: "Our law is *sui generis*." But the claim of "we're special" has never amounted to a reason to ignore either the Supreme Court or the general expertise of the judiciary in construing statutes, especially those outside the National Labor Relations Act.

*Id.* at 35 (Johnson, dissenting).<sup>8</sup>

Ultimately, the text of the FAA, the Supreme Court's decisions in *American Express* and *AT&T Mobility*, the five circuit courts that have rejected the NLRB's decision in *D.R. Horton*, and Judge Beckwith's decision in *Colley* clearly demonstrate that Respondent's Agreement does not violate the Act. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.<sup>9</sup>

For these reasons, the ALJ erred by finding that Respondent violated the Act.

### **III. THE ALJ ERRED BY FOLLOWING THE MAJORITY'S DECISION IN MURPHY OIL WHICH IMPROPERLY VALIDATED THE BOARD'S ERRONEOUS DECISION IN D.R. HORTON.**

As discussed in detail below, the ALJ erred by following the untenable holdings set forth in *Murphy Oil* and *D.R. Horton*. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12). The Board should take this opportunity to overrule this erroneous precedent.

#### **A. The *Murphy Oil* Majority's Attempt To Challenge The Fifth Circuit's Decision In *D.R. Horton* Was Unavailing. [Exception Nos. 12, 14].**

Especially in light of the Fifth Circuit's decision in *D.R. Horton*, the *Murphy Oil* majority opinion provides no support for the Board's (or ALJ's) incorrect position that *D.R. Horton* was correctly decided. The *Murphy Oil* majority panel insisted that the Board's decision in *D.R. Horton* did not conflict with the FAA because: (1) such a conclusion places an arbitration agreement on equal footing with other private contracts that conflict with federal law; (2) Section 7 rights are substantive, not procedural in nature; (3) the FAA does not explicitly establish that an arbitration agreement violative of the NLRA can be construed as enforceable but the FAA's

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<sup>8</sup> Respondent agrees with the arguments raised by Members Miscimarra and Johnson in *Murphy Oil* and incorporates them by reference herein.

<sup>9</sup> There does not appear to be a substantive allegation in the Complaint alleging that Respondent's Agreement could be interpreted to preclude employees from filing charges with the Board. Even if there were such an allegation, it would be meritless because Respondent's Agreement expressly preserves this right for employees.

savings clause does state that a conflict with federal law can be grounds for invalidating an agreement; and (4) even presuming a direct conflict between the NLRA and FAA, the Norris-LaGuardia Act (“NLGA”) mandates that the FAA yield to the NLRA. 361 NLRB No. 72, slip op. at 6.

For the reasons discussed below, because the majority panel was wrong on all of these accounts, the ALJ erred by relying upon *Murphy Oil*.

1. **The *Murphy Oil* Majority Ignored That The NLRA Does Not Protect or Restrict Non-NLRA Procedures Regarding How Other Courts or Other Agencies Will Adjudicate Non-NLRA Legal Claims. [Exception Nos. 12-14].**

As noted above, the *Murphy Oil* majority panel ignored that the Board has no authority to interpret the FAA or the NLGA, much less to make judgment calls as to which statutes prevail when there is an arguable conflict. Rather, this type of analysis is reserved for federal appellate courts, footnote 17 of the Board’s decision notwithstanding. (“The Board is not required to acquiesce in adverse decisions of the Federal Courts in subsequent proceedings not involving the same parties.”). *Id.* at slip op. 2.

In his dissent, Member Miscimarra eloquently pointed out that:

nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how *other* courts or *other* agencies would adjudicate non NLRA legal claims, whether as “class actions,” “collective actions,” the “joinder” of individual claims, or otherwise. Rather, Congress clearly contemplated that such procedural details would be adjudicated in accordance with procedures prescribed in non-NLRA statutes, supplemented by procedural rules authorized or adopted by Congress, State legislatures, and the courts and agencies charged with enforcing non-NLRA claims. Because the NLRA does not dictate or prescribe any particular procedures governing non-NLRA claim adjudications, I believe the Board lacks authority to conclude that “class” waivers constitute unlawful restraint, coercion, or interference in violation of Section 8(a)(1).

*Id.* at slip op. 23 (internal citations and footnotes omitted).

Member Miscimarra also correctly explained that:

... it defies reason to suggest that Congress, in 1935, incorporated into the NLRA a guarantee that non-NLRA claims will be afforded “class” treatment when there was no uniformity then—nor is there now— regarding what “class” treatment even means. The majority cites *D. R. Horton*, supra, for the proposition that Section 7 confers a “right to litigate ... employment-related claims concertedly on a *joint, class, or collective basis*” (emphasis added), but these terms have very different meanings. In *D. R. Horton*, the Board conceded: “Depending on the applicable class or collective action procedures, of course, a *collective* claim or *class action* may be filed in the name of *multiple employee-plaintiffs* or a *single employee-plaintiff*, with other class members sometimes being required to opt in or having the right to opt out of the class later.” 357 NLRB No. 184, slip op. at 3 (emphasis added and in original).

*Id.* at slip op. 26.

Member Miscimarra illustrated the lack of legislative intent which would have been necessary for the majority panel’s conclusions to be valid:

When enacting the NLRA in 1935, if Congress had intended to guarantee the availability of one or more of the above procedures regarding litigation of employees’ non-NLRA claims, one would reasonably expect this intent to be reflected in the Act or its legislative history. One would also expect there to be guidance as to which class-type procedures, regarding what stages, of non-NLRA litigation are guaranteed. However, the Act and its legislative history are completely silent as to these issues. Section 8(a)(1) and (b)(1)(A) merely prohibit restraint and coercion regarding “rights guaranteed in section 7.” And Section 7 confers protection triggered by “concerted” activity for the “purpose” of “mutual aid or protection,” which...may arise from non-NLRA claims and complaints *regardless of whether or not class-type procedures are applicable*.

*Id.* at slip op. 27 (Emphasis in original).

As a result, Member Miscimarra correctly explained that:

... if Section 7 guaranteed class-type procedures relating to claims brought under non-NLRA statutes, this would produce an array of incongruities that could not reasonably have been intended by Congress. The NLRA was designed to create a “single, uniform, national rule” displacing the “variegated laws of the several States,” producing the “uniform application of its substantive rules and . . . avoid[ing] . . . diversities and conflicts likely to result from a variety of local procedures and attitudes.” By comparison, as noted above, there is a near-endless variety of class-type procedures, their potential availability varies depending on the type of claim and the forum in which it is adjudicated, and extensive proceedings are necessary to determine whether class-type treatment is even appropriate in a given case. Such inherent uncertainty and variation regarding class-type treatment—if incorporated into the NLRA—would *preclude* any

“single, uniform, national rule.” Similarly, the existence or absence of class-type “protection” would necessarily involve “diversities and conflicts” of a type of that Congress adopted the Act to prevent.... The Board has no special competence regarding class-type procedures, and our determinations in this area almost certainly would not be afforded deference.

*Id.* at slip op. 28 (Emphasis in original, internal citations and footnotes omitted).

The majority panel in *Murphy Oil* disregarded the flaws illustrated by the dissenters and recklessly concluded that the underlying agreements in that case, which, like the present case, contain class/collection action waivers, violated the Act. Simply stated, Congress authorized the Board to enforce the Act, not other federal and state statutes. That is precisely why *Murphy Oil* is so overreaching and cannot remain valid.

**2. The *Murphy Oil* Majority Failed To Properly Accommodate The NLRA With The FAA [Exception Nos. 3-4, 6-15].**

The Board majority in *Murphy Oil* also accused the Fifth Circuit of failing to accommodate the NLRA with the FAA by “view[ing] the National Labor Relations Act and its policies much more narrowly than the Supreme Court has, while treating the Federal Arbitration Act and its policies as sweeping far more broadly than that statute or the Supreme Court’s decisions warrant.” *Id.* at slip op. 7. This unsupported contention qualifies as a clear double standard. The Board in *Murphy Oil* never explained why the FAA would need to yield to the NLRA under these circumstances. Instead, in wholly *ipse dixit* fashion, the Board majority simply declared that the NLRA trumps even though it has no authority whatsoever to interpret, much less enforce, the FAA.

Moreover, the Board majority in *Murphy Oil* asserted that “[t]he costs to Federal labor policy imposed by [the Fifth Circuit’s] decision would be very high...[because] [t]he substantive right at the core of the NLRA would be severely compromised, effectively forcing workers into economically disruptive forms of concerted activity and threatening the sort of ‘industrial strife’

that Congress recognized as harmful.” *Id.* However, this doomsday scenario is entirely speculative and contrary to Supreme Court and appellate court precedent. Specifically, if arbitration agreements of this sort presented such dire situations for American workers as the Board majority in *Murphy Oil* urged, this issue certainly would have arisen and been adjudicated by the Board well before *D.R. Horton* in 2012.

By contrast, Member Johnson’s dissent correctly pointed out that there must be a balance between Section 7 rights and employer interests and that the majority seemingly shirked its responsibility to evaluate these interests:

The majority disagrees that the Section-7-neutral interest of avoiding unwarranted aggregate liability is a proper subject for Board consideration. The majority’s view appears to be that it is Congress’ or the courts’ job to deal with whatever problems this might pose, not ours. But the Board has the statutory duty and functional responsibility to take account of employer interests in any Section 7 balancing that it performs. What’s more, both Congress and the Supreme Court have already told us via the FAA and its associated jurisprudence that there is nothing wrong with a party’s desire to avoid class litigation or class arbitration. Here, the Board is simply not doing its job, while also ignoring legislative and judicial recognition of the employer interest at stake.

*Id.* at slip op. 47. (Internal citations and footnotes omitted).

Although the majority panel in *Murphy Oil*, which the ALJ in the instant case followed, stated that no Supreme Court precedent is directly applicable to the consideration of the issues underlying the instant case, that is not the dispositive issue. The question is whether the majority’s position could co-exist with the Supreme Court’s clear FAA jurisprudence. As described above, it cannot. In fact, the Board had until July 15, 2014 to file an appeal of the Fifth Circuit’s decision overruling *D.R. Horton*. Rather than filing a petition for certiorari with the United States Supreme Court, the Board chose not to appeal. Instead, by virtue of its decision in

*Murphy Oil*, the Board appealed *D.R. Horton* to itself.<sup>10</sup> The logical conclusion to be drawn from its failure to appeal is the Board is acutely aware that the *D.R. Horton* decision is legally infirm. Such non-acquiescence is wholly unacceptable. In *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980), the United States Court of Appeals for the Second Circuit explained:

Of course, we do not expect the Board or any other litigant to rejoice in all the opinions of this Court. **When it disagrees in a particular case, it should seek review in the Supreme Court.** During the interim before it has sought review or while review is still pending, **it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one.**<sup>11</sup> However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow.

(Emphasis added).

Moreover, had the Board appealed to the Supreme Court, it would potentially have had the opportunity to persuade the Supreme Court why the High Court's FAA jurisprudence is inapplicable to these types of arbitration agreements and why the NLRA should prevail.

The Board should seek to harmonize its interests with those of other competing and higher authorities such as the Circuit Courts and Supreme Court. Therefore, the Board should reverse its decision in *Murphy Oil* and *D.R. Horton* and conclude that Respondent did not violate the Act.

### **3. The Joint Pursuit Of Legal Claims Is Not A Substantive Right Under Section 7 [Exception No. 14].**

The Board majority in *Murphy Oil* next erroneously concluded that the Fifth Circuit incorrectly held that "the pursuit of legal claims concertedly is *not* a substantive right under

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<sup>10</sup> The ALJ noted that he was bound by Board precedent, explaining that "The Respondent's arguments in this regard are for the Board to consider; not me, since I am bound to follow Board precedent that has not been reversed by the Supreme Court." (ALJ Dec., 5:25-29) (internal citations omitted). However, to date, the Board's conduct shows that it has no intention of appealing adverse determinations before the appellate courts to the Supreme Court such that its erroneous precedent will perpetually stand.

<sup>11</sup> Obviously, by deciding *Murphy Oil* and *Cellular Sales of Missouri*, and continuing to prosecute these types of cases, the General Counsel and Board have ignored the Second Circuit's instructive.

Section 7 of the NLRA.” *Id.* at slip op. 7. (Emphasis in original). Instead, according to the Board majority, its decision in *D.R. Horton* was correct in finding that the “right to engage in collective action—including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.” *Id.* (Emphasis in original, internal citations omitted). The Board majority then attempted to contrast other federal workplace statutes, such as the Fair Labor Standards Act and Age Discrimination in Employment Act, on the grounds that they “provide additional legal rights and remedies in the workplace, but in no way supplant, or serve as a substitute for, workers’ basic right under Section 7 to engage in concerted activity as a means to secure whatever workplace rights the law provides them.” *Id.* at slip op. 8. According to the Board majority, as applied to the instant case, “while the underlying legal claims involved the FLSA, it is the NLRA that is the source of the relevant, substantive right to pursue those claims concertedly.” *Id.*

Again, in what seems to be a central theme in its decisions in *D.R. Horton* and *Murphy Oil*, the Board majority provided no support for this contention. As dissenting Member Johnson aptly illustrated:

[t]his error results in the tautology that such rights are Section 7 rights because they are ‘substantive,’ and thus Section 7 protects them as substantive rights. **The Board cannot make something that walks like, looks like, and sounds like a procedural duck into a substantive swan, merely by declaring that it falls into the ambit of Section 7.**

*Id.* at slip op. 51 (emphasis added).

Moreover, if, as the Board majority suggested, Section 7 created this substantive right, other federal workplace statutes such as the FLSA or ADEA would specifically incorporate Section 7 into their text, either explicitly or implicitly. The Board majority did not and cannot point to any legislative history of any workplace statute affording employees a *substantive* right

to proceed collectively on these grounds. Therefore, an arbitration agreement containing a class or collective action waiver, like the present case, does not qualify as an improper prospective waiver of Section 7 rights. Therefore, the ALJ's reliance upon the Board's erroneous holdings in *D.R. Horton* and *Murphy Oil* is misplaced. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12).

**4. The FAA's Savings Clause Does Not Apply Here [Exception No. 10].**

The Board majority in *Murphy Oil* also found that the FAA's savings clause, which permits revocation "upon such grounds as exist at law or in equity for the revocation of any contract" applied. *Id.* at slip op. 9. However, as dissenting Member Johnson correctly illustrated:

The Supreme Court has made clear that the FAA savings clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." But the Court has also made clear that the FAA savings clause does not permit defenses that, while neutral on their face, "would have a disproportionate impact on arbitration agreements." *And the Court has made equally clear that any provision requiring classwide litigation is just such a defense.*

Requiring that classwide procedures always be available has an impermissible disproportionate impact on arbitration agreements, because in practice its prohibition falls more heavily on such agreements.... Nor does the alternative of classwide arbitration save the rule: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Either way, "employers would be discouraged from using individual arbitration." Accordingly, "the FAA requires not just compelling arbitration, but compelling arbitration on an individual basis in the absence of a clear agreement to proceed on a class basis.

*Id.* at slip op. 50. (Emphasis in original, internal citations and footnotes omitted).

The Board majority unpersuasively attempted to distinguish the Fifth Circuit's reliance on *AT&T Mobility* on the grounds that, unlike there, the issue was whether federal law preempted a state law barring class action waivers in consumer contracts. According to the Board majority, *D.R. Horton* has no connection to federal preemption, but rather, only a tie to

balancing two federal statutory schemes, the FAA and NLRA. Although the Board stated that in *D.R. Horton*, it “explained, with care, why in the context of cases like this one, the NLRA and the FAA are ‘capable of co-existence,’” no such explanation is apparent. *Id.* at slip op. 9. (Internal citations and footnotes omitted). Instead, to the Board majority, it truly is the NLRA or the highway with no inclination to harmonize with other competing interests. As a result, the Board majority’s decision was erroneous and it was improper for the ALJ to follow *Murphy Oil* in this regard. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12).

**5. The NLRA Does Not Contain A Contrary Congressional Command To Override The FAA [Exception No. 11].**

Given the Supreme Court’s recent decisions in *AT&T Mobility*, *CompuCredit*, *Marmet* and *American Express*, it cannot reasonably be argued that *D.R. Horton* and *Murphy Oil* are supportable. The ALJ’s attempt to reach a contrary result predicated upon the Board’s erroneous holdings in *D.R. Horton* and *Murphy Oil* is without merit. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12). This is especially so in light of *American Express*, which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. *American Express*, 133 S. Ct. at 2337. Rather, as noted by the Fifth Circuit, only a “contrary congressional command” in a particular statute can override the FAA’s mandate that arbitration agreements be enforced according to their terms. 737 F.3d at 361. However, according to the Board majority in *Murphy Oil*, “[w]e see no compelling basis for [the Fifth Circuit’s] conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file a collective legal action, and the procedures to be employed.” *Murphy Oil*, 361 NLRB No. 72, at slip op. 9. To support this meritless argument, the Board majority relied upon Section 10(a) of the Act, which states that the Board “shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise.” *Id.* at slip op. 8. Therefore, according to the Board majority, “[a]n arbitration agreement like the one here, even if it did not run afoul of the FAA’s savings clause, would seem to be precisely the sort of ‘means of adjustment . . . established by agreement’ that *cannot* affect the Board’s enforcement of Section 7.” *Id.* at slip op. 9. (Emphasis in original).

The majority placed more emphasis on Section 10(a) than it can possibly bear. As dissenting Member Johnson stated, there are several reasons that the Board majority’s findings are erroneous. First, “the words or phrases ‘class action,’ ‘class action waiver,’ or ‘arbitration agreement’ nowhere appear or are combined with ‘prohibit,’ ‘limit,’ ‘void,’ or any kind of express restrictions one would find necessary to override the FAA.” *Id.* at slip op. 53. Further, “it is obvious that the relatively generic term ‘concerted activity’ cannot function as an express obliteration of class action waivers.” *Id.* Simply stated, there is nothing in the text of the NLRA to “prohibit[] arbitration agreements under the reasoning of [*American Express*], a case which binds us on principles of statutory construction wherever conflict between the FAA and another statute may exist.” *Id.* at slip op. 53-54. Moreover, the Board majority is precluded from referring to its precedent “interpreting Section 7 in the context of group litigation to ‘bootstrap’ its way into creating an ‘express Congressional command’ to set aside arbitration agreements.” *Id.* at slip op. 54. Instead, as dissenting Member Johnson effectively drove the point home, “[s]imply put, we are not Congress, and our case adjudications cannot create that command.”<sup>12</sup> *Id.*

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<sup>12</sup> Section 10(a) is not a substantive right and “does not prohibit actions by employees, employers, or unions that may then in turn affect whether an unfair labor practice has been committed.” *Id.* at slip op. 54. Clearly, as Member Johnson found, if Section 10(a) really did have the effect that the majority insists it does, agreements waiving rights, such as no-strike provisions, could not exist. *Id.*

Accordingly, the ALJ improperly followed the Board's incorrect holdings in *D.R. Horton* and *Murphy Oil* that a congressional command exists to override the FAA under these circumstances. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12). The Board should therefore overrule this erroneous precedent and conclude Respondent did not violate the Act.

**6. There Is No Inherent Conflict Between the NLRA and FAA Based On Collectively Bargained Provisions [Exception Nos. 6-8].**

The *Murphy Oil* majority panel noted that it was “not persuaded by [the Fifth Circuit’s] view that there is no inherent conflict between the NLRA and the FAA.” The Board majority stated that “[t]hat the courts have understood the NLRA to permit *collectively bargained* arbitration provisions is irrelevant to the proper treatment of employer-imposed mandatory individual arbitration agreements.” *Id.* at slip op. 10. To this end, the Board majority explained:

[a]n individual arbitration agreement, imposed by employers on their employees as a condition of employment and restricting their rights under the NLRA, is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen bargaining representative and an employer that has complied with the statutory duty to bargain in good faith.

*Id.*

However, the Board majority in *Murphy Oil* failed to account for the fact that, because collective bargaining is necessarily a give and take procedure, a union can ultimately agree to an arbitration protocol which guarantees represented employees fewer rights than what an employer might unilaterally implement in a non-unionized context. In *D.R. Horton*, the Fifth Circuit clearly illustrated this point, explaining that “courts repeatedly have understood the NLRA to permit and require arbitration, [and] [h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA.” 737 F.3d at 361 *citing Blessing v. Freestone*, 520 U.S. 329, 343 (1997)(“[W]e discern[] in the structure of the [NLRA] the very

specific right of employees to complete the collective-bargaining process and agree to an arbitration clause.”) (internal quotation marks and citation omitted).

As a result, because there are no legitimate grounds to distinguish between a unionized and non-unionized context in this case, the Board majority’s objection to the Fifth Circuit’s finding in this regard is unavailing.<sup>13</sup>

**B. Notwithstanding The Fifth Circuit’s Explicit Findings, The Board Majority Erroneously Continued To Maintain That *D.R. Horton* Was Correctly Decided [Exception Nos. 1-5, 12-15, 17].**

Although the Fifth Circuit explicitly found that *D.R. Horton* was incorrectly decided, the *Murphy Oil* majority panel (and subsequent panels) nevertheless reaffirmed the erroneous holding which the ALJ subsequently followed. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12). To do this, the Board has relied upon several rationales supporting *D.R. Horton*’s validity, all of which are untenable and addressed below.

**1. Mandatory Arbitration Agreements Precluding Employees From Bringing Group Workplace Claims Do Not Affect Any Substantive Rights Under the NLRA [Exception Nos. 5, 14].**

First, notwithstanding the extensive discussion *supra* as to why the Fifth Circuit correctly decided the issue, the majority panel nevertheless explained that “[m]andatory arbitration

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<sup>13</sup> In addition, although not specifically addressed by the ALJ, the *Murphy Oil* majority’s contention that it was entitled to rely upon the NLGA is similarly misplaced. The NLGA provides that “yellow-dog” contracts are unenforceable in federal court and specifically defines such a contract as one in which an employee “promises not to join, become, or remain a member of any labor organization” or to forgo his employment if he does become a member of a labor organization. 29 U.S.C. § 103. Moreover, much like Section 7 of the NLRA, the NLGA also recognizes an employee’s right to “be free to decline to associate with his fellows.” 29 U.S.C. § 102.

It is nonsensical to find that arbitration agreements containing collective/class action waivers—which according to the Supreme Court is a dispute resolution mechanism to be promoted, not discouraged—is an illegal agreement or, worse yet, a “yellow dog contract.” The Board in *Murphy Oil* could not seriously be suggesting that the U.S. Supreme Court is promoting “yellow dog contracts” in its recent seminal decisions promoting arbitration and validating class/collective action waivers. As a federal court has held recently, the NLGA, “specifically defines those contracts to which it applies [i.e., yellow-dog contracts]. An agreement to arbitrate is not one of them.” *Morvant v. P. F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. May 7, 2012) (citation omitted). For an in-depth discussion of why the majority’s reasoning fails in this regard, see Member Johnson’s dissent at 54-56.

agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act.” 361 NLRB No. 74, at slip op. 5. (Emphasis in original, internal citations omitted). The majority cited examples of cases in which the Board and courts have found that “litigation pursued concertedly by employees is protected by Section 7 has been upheld consistently by the Federal appellate courts....” *Id.* (internal citations and footnote omitted). While it may be true that such concerted litigation is protected by Section 7, the panel does not and cannot explain why an employer may not place restrictions on such litigation.

That the NLRA preserves an employee’s “freedom of choice” in voluntarily deciding for himself or herself to participate or not in a class/collective action is explicitly recognized in *Salt River Valley Water Users’ Assoc v. NLRB*, 206 F.2d 325 (9th Cir. 1953), a case heavily relied on by the Board in *D.R. Horton* and *Murphy Oil*. In *Salt River*, the Ninth Circuit held that employees have a Section 7 right to collect signatures on a petition authorizing the filing of a Fair Labor Standards Act collective action. In a part of the *Salt River* decision not cited by the Board, the Ninth Circuit reversed a Board finding of an unfair labor practice against the employer for allegedly coercing an employee to remove his name from the petition and thus to refrain from participating in the proposed collective action. It did so because the employee had removed his name voluntarily and without coercion, and did not perceive the employer’s articulated displeasure with the petition as a “threat.” In other words, the Ninth Circuit recognized that the employee had simply exercised his right to “refrain” from participating in the proposed collective action. *Salt River*, 206 F.2d at 329. As found in *Salt River*, a voluntary agreement to arbitrate only individual claims, such as the arbitration agreement at issue here, is

tantamount to an employee's exercise of his or her right to "refrain" from participating in class/collective action litigation and cannot, standing alone, give rise to an unfair labor practice.

Similarly, as outlined by Member Miscimarra in his *Murphy Oil* dissent, "Section 9(a) of the Act explicitly protects the right of every employee *as an 'individual'* to 'present' and to 'adjust' grievances '*at any time.*'" *Murphy Oil, supra*, slip op. at 30 (Miscimarra, dissenting) (emphasis in original). Certainly this statutory guarantee applies equally to an individual's ability to agree to the procedures that will govern his or her claim. Similarly, the Supreme Court has already determined that a union may waive an employee's rights in litigating non-NLRA claims in court, *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009), and it is difficult (if not impossible) to "so easily adopt the view that a union may waive employees' rights with regard to the litigation of employment claims – even over an individual employee's strenuous objection – but employees *somehow* cannot waive the same rights on their own. That defies logic." *Murphy Oil, supra*, slip op. at 48 (Johnson, dissenting) (emphasis in original).

The majority panel also contended that the Supreme Court's decision in *Eastex v. NLRB*, 437 U.S. 556, 565-566 (1978) establishes that the right to engage in collective legal action in administrative and judicial forums is the core substantive right protected by the NLRA, and not merely a procedural right as the Fifth Circuit concluded in its *D.R. Horton* decision. *Id.* at slip op. at 5. The ALJ repeated this argument in his decision. (ALJ Dec. 5). However, the Supreme Court in *Eastex* recognized only that the circuit courts construing Section 7 have found that employees are protected from employer "retaliation" when pursuing such relief in "administrative and judicial forums," and left for a later day what constitutes "concerted

activities’ in this context.”<sup>14</sup> *Eastex*, 437 U.S. at 566, n. 15. Therefore *Eastex* does not support the Board majority’s findings in *Murphy Oil*.<sup>15</sup>

**2. Employer-Imposed Arbitration Agreements Do Not Restrict Section 7 Rights [Exception Nos. 1-3, 8-9, 15].**

Next, the Board majority in *Murphy Oil* attempted to defend *D.R. Horton* by asserting that “[e]mployer-imposed individual agreements that purported to restrict employees’ Section 7 rights, including agreements that require employees to pursue claims against their employer individually, violate the National Labor Relations Act, as the Board, the court of appeals, and the Supreme Court have held.” *Id.* at slip op. 5 (internal citations omitted). However, none of the authority cited stands for the proposition that an employee may not waive the right to participate in a collective or class action. Instead, all of the Board majority’s cases involved the enforceability of individual contracts that were intended either to impede union organizing or to be used as a weapon in collective bargaining. *See NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (Company entered into individual contracts in which the “employee not only waived his right to collective bargaining but his r[i]ght to strike or otherwise protest on the failure to obtain redress through ar[b]itration”); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944) (Company attempted to use individual contracts as a means to “impede employees” from organizing); and *National Licorice Co. v. NLRB*, 309 U.S. 350, 354, 361 (1940) (As a “means of thwarting the

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<sup>14</sup> In fact, as discussed *supra*, had the Board opted to appeal the Fifth Circuit’s decision in *D.R. Horton* to the Supreme Court, there was a possibility that it could have urged the High Court for clarification. Of course, for the reasons suspected *supra*, the Board did not do so.

<sup>15</sup> As Member Miscimarra explained in his dissent,

Conversely, the mere existence of a non-NLRA legal claim or complaint--or the involvement of two or more employees in some of the above activities--does not necessarily mean the employees are engaged in “concerted” activity, nor does it necessarily establish the “purpose” of “mutual aid or protection....”

*Id.* at slip op. 25. *See also* Member Johnson’s dissent at slip op. 41-43.

policy of the Act,” the company threatened employees that, if they did not sign individual contracts requiring them to waive the right to strike, their jobs, among other things, would no longer be protected).

The courts found all of these contracts unenforceable because they encroached upon clearly defined rights in the workplace and evidenced the employer’s transparent effort to circumvent those rules. Moreover, as the Supreme Court emphasized in *J.I. Case*, these cases do not stand for the proposition that an employer cannot contract “with individual employees under circumstances which negative [*sic*] any intent to interfere with employees’ rights under the Act.” 321 U.S. at 340-341. Indeed, the employer remains “free to enter into individual contracts” when the employer is “under no legal obligation to bargain collectively.” *Id.* at 337. Therefore, *Murphy Oil* was also erroneous for the reason and the ALJ erred to the extent he relied upon *Murphy Oil* in this case.

**3. The *Murphy Oil* Majority’s Remedy Creates An Unworkable Framework. [Exception Nos. 11].**

As noted by Member Johnson in his dissent, the *Murphy Oil* majority incorrectly held that the employer violated the NLRA by filing a successful motion under the FAA. What is worse is that the Board majority ordered *Murphy Oil* to reimburse plaintiffs for their attorneys’ fees in a case they *lost*. Member Miscimarra correctly illustrated the fundamental flaw in the Board majority’s thinking: “The Board cannot impose a ‘single, uniform, national rule’ regarding these issues unless there is a parallel NLRB proceeding, pertaining to *every* case in which a ‘class’ waiver is enforced, so the Board can adjudicate and impose in these other cases the same remedies being formulated here.” *Id.* at slip op. 29 (internal citations and footnotes omitted). The Board can only exercise jurisdiction if a charge is filed and only has jurisdiction over certain employers.

Accordingly, as Member Miscimarra poignantly explained, “even if there were parallel Board proceedings regarding *every* court case involving a disputed ‘class’ waiver agreement, the Board-ordered ‘remedy,’ if somehow imposed on the non-NLRA courts and agencies, would produce a patchwork where (i) some plaintiffs and defendants would have non-NLRA procedural issues dictated by the NLRB, and (ii) these same procedural issues for other plaintiffs and defendants--even *in the same case*--would be adjudicated by the non-NLRA court or agency.” *Id.* at slip op. 29 (emphasis in original).

Therefore, contrary to the *Murphy Oil* majority’s erroneous conclusion, “[n]othing in the Act suggests that Congress authorized the Board to engage in these types of haphazard, redundant and self-contradictory enforcement efforts regarding *non*-NLRA laws that, substantively and procedurally, are enforced by courts and agencies *other than* the NLRB.” *Id.* (emphasis in original, internal citations omitted). To the extent the ALJ adopted *Murphy Oil* in this regard, the ALJ erred in doing so. (ALJ Dec., 4:28-37; 5:1-9, 18-19, 29-52; 6:1-12).

**IV. THE ALJ’S ORDERED REMEDY IS IMPROPER, IS PREEMPTED BY THE FAA, AND VIOLATES RESPONDENT’S FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT. [Exception Nos. 16-17].**

The ALJ’s Recommended Order seeks broad remedies, including ordering Respondent to cease and desist from maintaining or enforcing a mandatory arbitration agreement that requires employees to waive their right to pursue class or collective action claims in all forums, cease attempting to enforce the Agreement in court, and reimburse plaintiffs in the underlying *Colley* litigation for all reasonable legal fees and expenses, within interest, incurred in opposing Respondent’s *successful* motion to compel arbitration for one opt-in class member. (ALJ Dec., 8:35-46, 9:1-7). In addition, the ALJ’s Recommended Order requires Respondent to: (a) rescind the requirement that employees enter into the Agreement as a condition of employment and

expunge all such Agreements; (b) rescind or revise the Agreement to clarify that it does not constitute a waiver of the right to pursue class/collective action claims in all forums or file unfair labor practice charges with the Board; (c) notify all applicants as well as current and former employees of the revised agreement and provide them with a copy of the same; (d) notify the U.S. District Court for the Southern District of Ohio, which has already upheld the Agreement, that Respondent no longer seeks for enforce the Agreement; and (e) post a Notice at its facilities where the Agreement has been maintained or enforced. (ALJ Dec., 9:10-44, 10:1-10).

These recommended remedies are improper and unenforceable for a number of reasons. First, as shown above, Respondent did not violate the Act. Second, the ALJ's Recommended Order should be rejected to the extent it requires Respondent to rescind or otherwise modify the Agreement. As discussed above, the Supreme Court's recent decisions demonstrate that the FAA has a very broad preemptive effect, and that all state and federal laws and public policies interfering with the enforcement of arbitration agreements according to their terms must give way. Thus, in *Marmet*, the Supreme Court vacated a decision by the Supreme Court of Appeals of West Virginia which held that West Virginia's public policy against arbitration of personal injury or wrongful death claims against nursing homes was not preempted by the FAA. The Supreme Court stressed that West Virginia's policy was "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Marmet*, 132 S. Ct. at 1204. In *AT&T Mobility*, the Supreme Court found that a rule which stands as an "obstacle" to the accomplishment of Congress' objectives under the FAA cannot stand. *AT&T Mobility*, 131 S. Ct. at 1753.

Here, the recommended remedies clearly create obstacles to the enforcement of arbitration agreements according to their terms and, therefore, conflict with the FAA. The

recommended relief would require Respondent to stop enforcing its Agreement which is completely contrary to the Supreme Court's mandate that arbitration agreements be enforced according to their terms.

Third, the ALJ's Recommended Order is a dramatic overreach. The Board simply lacks the authority to order Respondent to discontinue pursuit of a legal position (that the Agreement should be enforced in the *Colley* wage and hour litigation) that has already been successful. Under controlling Supreme Court precedent, the Board cannot enjoin a lawsuit or litigation position unless the lawsuit or position is baseless **and** motivated by an unlawful purpose. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 517 (2002). Indeed, the Board has acknowledged that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right." *Peddie Buildings*, 203 NLRB 265, 272 (1973), *enforcement denied on other grounds*, *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974).

This aspect of the ALJ's recommended remedy clearly infringes on Respondent's First Amendment right to petition the Government for redress of grievances. In *Bill Johnson's*, 461 U.S. 731, 748 (1983), the Supreme Court determined that the Board could issue remedies related to non-Board litigation only if the external litigation was both (1) meritless and (2) retaliatory. *Id.* at 747. Here, there can be no question that Respondent's legal position that the Agreement is enforceable has merit ***because the U.S. District Court agreed with Respondent's position and enforced the Agreement in its entirety.*** In addition, neither Colley nor the General Counsel have argued (nor could they in good faith) that Respondent's position in the underlying *Colley* litigation is retaliatory. As a result, the ALJ's recommended order should be rejected.

Although the Court in *Bill Johnson's* noted that state court litigation could be enjoined by the Board when it is preempted by federal law or “has an objective that is illegal under federal law,” *Id.*, at 737 n.5, this limited exception has no application to the *Colley* litigation, which is pending in federal, not state, court. In addition, no colorable argument can be made that Scherzinger’s objective in seeking to compel arbitration in the *Colley* litigation was illegal. In reviewing this exact issue, the Fifth Circuit in *Murphy Oil* stated:

We start by distinguishing this dispute from that in *Bill Johnson's*. The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as *Bill Johnson's* may have been. Moreover, the Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

808 F.3d 1013, 1021 (5th Cir. 2015) (internal citation omitted). Respondent respectfully submits that Judge Beckwith may have the same reaction to the ALJ’s proposed remedy in this case.

Ultimately, the ALJ’s recommended remedial regime would undoubtedly discourage the use of arbitration, contrary to federal policy under the FAA. As such, the preemptive effect of the FAA invalidates these remedies. The proposed remedies are also improper and unenforceable under established precedent. They should be rejected by the Board.

V. **CONCLUSION.**

The ALJ's decision finding that Respondent has violated Section 8(a)(1) is meritless based on a myriad of reasons. It is premised on the Board's erroneous decisions in *Murphy Oil* and *D.R. Horton*, the latter of which has been rejected by numerous courts and cannot be reconciled with the Supreme Court's decisions interpreting the FAA, including the High Court's most recent decision in *American Express*. Significantly, the Board's rationale in *D.R. Horton* has been explicitly or implicitly rejected by five Circuit Courts that have reviewed the issue, including the Fifth Circuit which recently set aside the actual *D.R. Horton* itself.

For all the reasons stated herein, and contrary to the ALJ's findings, conclusions, and recommended order/remedies, Respondent respectfully submits that it has not violated any provision of the Act and that the Complaint should be dismissed.

Dated: July 15, 2016

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

This is to certify that on July 15, 2016, a copy of the foregoing was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

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